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No. 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D.H. HOLMES CO., LTD.,

Appellant,

VS.

SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT ON APPEAL FROM THE COURT OF APPEALS FOURTH CIRCUIT STATE OF LOUISIANA

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

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QUESTION PRESENTED

Has the State of Louisiana met the burden to justify overturning the long standing principle of non-taxation of items in interstate commerce pursuant to Article 1, Section 8, Clause 3 of the United States Constitution when advertisements such as catalogs are mailed from an out of state printer directly to potential customers of the taxpayer within the state, without charge.

PARTIES TO THE PROCEEDING

The appellant is D.H. Holmes Co., Ltd., and the appellee is Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana.

Rule 28.1 Listing

Amicus, the National Association of Catalog Showroom Merchandisers states that it is a national trade association of discount retailers, known as catalog showrooms that has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

INTEREST OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Association of Catalog Showroom Merchandisers ("NACSM"), incorporated under the laws of the State of New York in 1972, is a trade association representing a segment of discount retailing encompassing approximately 2,000 retail stores which do approximately $8 to $10 billion in annual sales. All NACSM members use an annual national or regional catalog as a primary advertising medium.

STATEMENT OF THE CASE

This is a case of a New York printer mailing catalogs to potential customers of a New Orleans retailer in that state; it is a method of doing business similar to that of NACSM members.

This case presents a substantial question never before directly addressed by this Court which will have a serious impact upon NACSM members. Catalog showrooms use the mails to send free catalogs into the different states and, upon information and belief, many state taxing authorities await the decision of this Court to ascertain the limits of their authority to tax catalogs, flyers, and other advertisements that are in interstate commerce.

In a number of cases at the state level NACSM members have successfully defended against claims of a use tax on catalogs still in interstate commerce.

Amicus curiae supports appellant in urging that the protection of goods, or catalogs, in interstate commerce from taxation by a state is the essence of the commerce clause of our constitution.

SUMMARY OF ARGUMENT

It has become widely recognized that the United States and all free economies depend upon the efficient allocation of resources both in the development, manufacture and production of products, as well as in the distribution of those products.

Every isolated attempt to restrain or burden one segment of a community runs the risk of upsetting how this process works. Taxation authorities, denied the experience, accountability and fact finding processes of the legislature and judicial branch, are least equipped to balance the economic and political consequences, as well as the statutory and constitutional mandates in making the determination of when a use tax should be imposed upon an advertising medium. Nevertheless, the Louisiana courts have countenanced such a process.

ARGUMENT

I. THIS "USE TAX" CASE IS AN INAPPROPRIATE ONE TO EXTEND PERMISSIBLE LIMITS FOR A STATE SALES TAX.

This attempt by the State of Louisiana to impose a tax on items still in the free flow of interstate commerce is a particularly inappropriate one. *See McLeod v. Dilworth Co.*, 322 U.S. 327 (1943); see also *Miller Bros. v. Maryland*, 347 U.S. 34 (1954) which held that the mailing of a catalog could not possibly impose a use tax. This brief argues that the state courts consistently erred in finding that the taxing authorities could collect a use tax under Louisiana R.S. 47:305(5).

The instant proceeding is the result of an administrative agency decision to charge a company a tax on catalogs mailed from out of state to members of the consuming public within the State of Louisiana.

All of these state citizens will not become customers of D.H. Holmes Co., Ltd., a retail chain of department stores ("appellant"). Even those members of the public who elect to purchase from appellant may or may not do so as a result of the catalog, and any and all such subsequent sales are subject to a state sales tax. Thus, to the extent that there is any taxable exchange with the State of Louisiana, the state seeks to impose two taxes.

In a somewhat analagous case, a Florida court was asked to uphold a use tax on the stand in which pens were sold, as well as a sales tax on the pens themselves. The Court declined to do so. *Scripto, Inc. v. Carson* 105 So. 2d 775 (Fla. 1958), 362 U.S. 207; see also *Sears Roebuck & Co. v. Massachusetts State Tax Commission*, 345 N.E. 893 (Massachusetts 1976). See also *Burger King v. N.Y.S. Tax Commission*, 70 A.D. 2d 447 (1980) for the proposition that the taxing agency cannot impose a use tax on plastic cups when it also charges a sales tax on the ultimate sale of the beverage.

Furthermore, it seems contradictory to the long term best interests of the state to discourage the use of interstate advertising, and it creates serious constitutional problems when clear limits are not set. For if Louisiana can tax catalogs still within the control of the United States Postal Service, why can't the state taxing agency impose a tax upon advertising on television air waves transmitted from Atlanta, perhaps allocating the tax by utilizing the percentage the viewing public in the state bears to the total audience. If so, is a tax payable by a Radio Havana or any other communication that stimulates the senses of Louisianians? This cannot be considered a rhetorical question in the current economic environment when many taxing authorities are displaying a thirst for additional revenues from any source.

The argument is comparable to taxing one type of publication, but not another, which raises separate issues of unlawful discrimination between classes of merchants, by application of the law, if not by statute. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

II. THE LOUISIANA DEPARTMENT OF REVENUE & TAXATION DOES NOT HAVE THE POWER TO TAX THESE CATALOGS.

Because of financial pressures on state government executives, the case before this Court is a timely and important one which will be widely considered when the appropriate means to raise state revenues are considered. The need to reverse is compelling since it is not the state legislature which has sought to expand and test the constitutional limits of the state's right to tax. As this Court has long noted " . . . If our legislators become too arbitrary in their exercises of their powers, the people always have a remedy in their hands. . . . . " See *Chicago, Milwaukee & St. Paul RR v. Minnesota*, 134 U.S. 418 (1889).

The taxing agency is subject to no such public accountability and it is to the courts appellant must look to remedy an abuse of power. It is most certainly an issue on substance over form, with the operating circumstances governing. *See American Oil Co. v. Neill*, 360 U.S. 451 (1959).

However, the absurdity of removing all limits on a state's taxing power is not the only reason to reverse the decision of the State of Louisiana Fourth Circuit Court of Appeals. There is long standing and strong legal precedent to overturn the decision of the Court below.

III. THE STATE OF LOUISIANA HAS NOT MET ITS BURDEN TO JUSTIFY OVERTURNING THE LONG STANDING CONSTITUTIONAL PRINCIPLE OF NON-TAXATION OF ITEMS IN INTERSTATE COMMERCE PURSUANT TO ARTICLE 1, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

The State of Louisiana did not even offer any sufficient reason at the lower judicial levels to justify reversing clear and conflicting precedent.

The long established rule is that items moving in interstate commerce may not be taxed before they come to rest. *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1977); see *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

This is not a case of insufficient retailer contact with the state to justify imposition of a sales tax as in *National Bella & Hess v. Dept. of Revenue* 386 U.S. 753, (1968) but rather one of insufficient contact of the "goods", that is advertisements, still in interstate commerce.

The very issue of imposing a use tax on catalogs sent by a regional or national retail chain by mail to potential customers within the state asserting the right to tax has been considered by a number of states. We are aware of no case, before the decision of the Louisiana Court in the case at bar, that upheld the tax.

The first of these state court cases involving a NACSM member was decided by the highest court of Tennessee. In that case *Service Merchandise Co., Inc. v. Tidwell*, 529 S.W. 2d 215 (Tenn. 1975) the Tennessee Supreme Court found that catalogs shipped by common carrier from a printer in the north central states to a local post office for mailing to consumers in the state did not come to sufficient rest and control of plaintiff to be deemed a taxable event.

In the *District of Columbia v. W. Bell & Co., Inc.* 420 A.D. 2d 1208 (D.C. App. 1980) the Court once again upheld the nontaxability of catalogs shipped from a Georgia printer to consumers in the district.

In both the *Service Merchandise* and *W. Bell & Co.* cases the catalog showroom company had stores within the taxing jurisdiction. The *W. Bell & Co., Inc.* case supra is also instructive in that the Court determined that the word "use" does not encompass such circumstances as mailing them from out of state to residents within the state, rejecting the concept of any "promotional" effect. The court said it found the *Bennett Brothers* decision, discussed *infra*, to be persuasive.

In *Bennett Brothers, Inc. v. N.Y.S. Tax Commission*, 405 N.Y.S. 2d 803 (N.Y. Ct. of Appeals 1978), New York's highest court of appeals not only found that there was no authority to charge a use tax on catalogs mailed from out of state to consumers within the state, but taxed the state "costs" to express its displeasure of the taxing agency to even attempt to charge the merchant. In this case as in the *Service Merchandise* and *W. Bell* cases, the retailer had stores in the state that the taxing authority sought to impose the use tax. The Court once again focused upon a lack of any real control over the property within the state when it is still in the flow of interstate commerce.

The Court noted that the state imposed a use tax based upon the erroneous conclusion by the taxing authority that the merchant exercised a right of control over the destination of the catalogs. The Court held that the prior case of *Matter of Ford Motor Company* concluded that distribution of advertising material to Ford distributors in the state did not constitute a taxable event, and that there was no distinction at law between the cases. The Court further noted that the claim that no tax was due was bolstered by the fact that it is not an exemption that is claimed, but rather the contention that the catalogs in issue are not even covered by the taxation statute, citing *Grace v. N.Y.S. Tax Commission*, 37 N.Y. 2d 193 (1975).

The mere power of the owner to divert the shipment already started does not take it out of interstate commerce. *Hughes Bros. Timber Co. v. Minnesota*, 1272 U.S. 469 (1926); see also *Farmers Union Corp. v. Kansas State Corp. Comm.*, 302 F. Supp 778 (D.C. Kan. 1969).

The appellant released control of the catalogs when it released them to the U.S. mails. As innumerable courts have noted the "gift," if that is to be the nomenclature, took place outside of Louisiana. The appellant did not control the use and enjoyment within the state. The present case cannot be compared with *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) in that *Complete Auto* rests upon a tax for doing business within the state, a condition appellant fully complies with, having retail stores within the state and paying sales tax on all transactions within the state.

It is a well established principle of statutory construction that taxing statutes should be more strongly construed against the taxing authority *Gould v. Gould*, 245 U.S. 151 (1917); 51 *Am Jur*, Taxation, Section 308, 82; *C.J.S.*, Statutes Section 390; 2 Cooley *Taxation*, 4th Ed. Sec 503. Thus any ambiguity in the scope of the statute must be construed against the imposition of any tax. Furthermore, no tax can be imposed under the United States Constitution.

Courts have recognized that it is inappropriate to extend a sales/use tax to such advertising as newspaper supplements in cases such as *Sears Roebuck & Co. v. Mass. State Tax Commission, supra*, spurning such "fine spun" distinctions as the state taxing authority would have this court accept. See for example *Mart Realty, Inc. v. Norberg*, 111 R.I. 402 (1973) wherein the court held that the mailing of advertising circulars into the state relegated any potential "use" to that of the potential customer.

CONCLUSION

Implicit in this reasoning is the recognition that it is the consumer who receives the catalog. The consumer did not make any payment to warrant a sales tax, and ordinarily does not consent to its receipt to warrant a use tax. The taxing agency then refusing to acknowledge that there has not been a taxable event, ignores the interstate commerce issue and in this case even ignores that there has not been any legislative mandate to so burden commerce. The tax administrator merely decides to take the money and let the courts decide the issue. NACSM respectfully suggests that this decision is clearer than most. A use tax should not and cannot be imposed upon catalogs in such circumstances without violating the United States Constitution, Article 1, Section 8, Clause 3.

The National Association of Catalog Showroom Merchandisers respectfully requests that the Court reverse Court of Appeals of the Fourth Circuit of the State of Louisiana, in the public interest.

Respectfully submitted,

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